

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRED NAZIF,

No. C-13-5498 EMC

Plaintiff,

v.

COMPUTER SCIENCES CORPORATION,

Defendant.

**ORDER (1) GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT; (2) DENYING AS MOOT
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT; AND (3)
DENYING AS MOOT PLAINTIFF'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

(Docket Nos. 66, 67, 71)

I. INTRODUCTION

Plaintiff Fred Nazif brought this action against his former employer, Defendant Computer Sciences Corporation (CSC), alleging that his employment was terminated in retaliation for making internal reports of alleged securities law violations and/or refusing to participate in CSC's unlawful activities. *See* Docket No. 39 (Second Amended Complaint). Nazif's operative complaint contains three causes of action: (1) whistleblower retaliation in violation of Section 21F of the Dodd Frank Act (Dodd Frank or DFA); (2) retaliatory termination in violation of California Labor Code § 1102.5; and (3) wrongful termination in violation of public policy.

Pending before the Court is CSC's motion for summary judgment.¹ Docket No. 71. After reviewing the briefs and considering the views expressed during extended oral argument on this

¹ Also pending before the Court is Plaintiff's motion for partial summary judgment and Plaintiff's motion for judgment on the pleadings. Docket Nos. 66-67. Because the Court grants Defendant summary judgment, and thereby resolves this case in its entirety, the Plaintiff's pending motions are hereby denied as moot.

1 matter, the Court concludes CSC is entitled to summary judgment on all three of Nazif's asserted
 2 claims. As explained in more detail below, Nazif submitted insufficient evidence that he actually
 3 engaged in a protected activity (*i.e.*, blew the whistle) to recover under Dodd Frank, because there is
 4 no evidence that his subjective belief that CSC violated securities laws was objectively reasonable.
 5 More specifically, Nazif's DFA claim fails because he did not submit evidence from which a
 6 reasonable juror could conclude that Nazif reported *material* securities law violations to his
 7 supervisors. Nazif's California Labor Code cause of action fails because he presented no evidence
 8 that he refused to participate in an activity that would violate a federal or state statute or regulation,
 9 as required to maintain a retaliation claim under section 1102.5(c). And Nazif's wrongful
 10 termination in violation of public policy claim necessarily fails because it is derivative of his first
 11 two causes of action.

12 **II. BACKGROUND**

13 Plaintiff Fred Nazif has been a Certified Public Accountant since the mid-1990s. Docket No.
 14 82-7 (Nazif Decl.) at ¶ 3. During this time, Nazif has provided accounting and auditing services
 15 mostly to large "high-tech" companies like Hewlett Packard and Defendant CSC. *See id.* at ¶ 4-8.
 16 Nazif has "gained extensive experience in public company accounting issues, particularly as it
 17 relates to accounting for high tech companies and revenue recognition" including "extensive
 18 knowledge of US GAAP [(Generally Accepted Accounting Principles)]." *Id.* at ¶ 9.

19 Nazif was hired by CSC in July 2012 to serve as a Technical Accounting Director. Docket
 20 No. 82-13 at 313. According to Nazif, he was "aware that CSC had settled a securities fraud class
 21 action for \$97.5 million the previous December," but he was assured during his interview that "CSC
 22 was taking corrective action." Nazif Decl. at ¶ 12. Nazif's job duties included providing "technical
 23 accounting support for significant transactions," reviewing "the application of revenue recognition
 24 guidance for new and existing contracts," and ensuring the "accuracy of financial statements."
 25 Docket No. 71-4 at 12. Nazif was initially assigned to report to April Hand, a fellow accountant at
 26 CSC. *Id.*

27 During the time that Nazif reported to Hand, Nazif apparently became aware of what he
 28 believed to be errors in CSC's accounting practices. Nazif's concerns were five-fold. The first

1 concern was about certain 2006 contracts with Abbott Labs (Abbott Contracts). During a joint
2 conference call with other audit staff, an audit staff member (not Nazif) noticed a mistake in the
3 accounting treatment under the Abbott Contracts. Nazif Decl. at ¶ 17. Hand adjusted the accounting
4 treatment for the Abbott Contracts, but Nazif claims that Hand's adjustment was "incorrect" because
5 she took two contracts that were worth more than \$1 million in total, and "split the two contracts and
6 adjusted them separately." *Id.* Nazif claims that he believes Hand "did that to avoid having to make
7 an out of period adjustment." *Id.*

8 After learning of the improper accounting treatment in the Abbott Contracts, Nazif states that
9 he became "concerned" that the issue had gone unspotted for six years. Nazif Decl. at ¶ 19. While
10 Nazif now acknowledges that the Abbott Contracts had been signed by another company that was
11 later acquired by CSC (hence, CSC's auditors would not have reviewed the contracts at the time the
12 predecessor entity signed them in 2006), in 2012 he was concerned that there might be other existing
13 contracts that contained similar accounting errors that had gone unspotted by CSC accountants. *Id.*
14 Consequently, Nazif suggested to Hand that she "review other contracts to determine whether the
15 issue was widespread." *Id.* He also informed Hand that he believed her accounting adjustment for
16 the Abbott Contracts was "incorrect." *Id.* Nazif admits that Hand inquired within CSC whether the
17 identified accounting issue was a "common" problem in prior contracts, and indicates that Hand was
18 reassured that it was not. *Id.* Nevertheless, Nazif claims that Hand's inquiry was insufficient under
19 GAAP because her investigation consisted of calling and receiving assurances from "the same
20 business unit that did not notice the issue [in the Abbott] contract[s] for six years." *Id.* According to
21 Nazif, this inquiry was not GAAP compliant because "accountants are expected to use professional
22 skepticism when exercising their judgment." *Id.* Nazif alleges that a GAAP compliant investigation
23 into the contract issue would have taken significantly longer than the investigation Hand undertook.
24 *Id.* Nazif claims that Hand stopped communicating with him about Abbott Labs after he raised his
25 concerns with her. *Id.*

26 Nazif's second concern was with improper accounting treatment relating to a contract with
27 Arc Insurance. Nazif Decl. at ¶ 20. According to Nazif, revenue was being recognized under the
28

1 Arc contract improperly, but when he “contacted Ms. Hand about it, she told me that we should not
2 rock the boat, and took me off the job” reviewing the Arc contract. *Id.*

3 The third accounting problem Nazif observed was with a type of accounting treatment called
4 Vendor Specific Objective Evidence, or VSOE. Nazif Decl. at ¶ 21. According to Nazif, CSC was
5 using VSOE to recognize revenue on certain contracts, but was not doing so consistently with
6 GAAP best practices. *Id.* Moreover, while Nazif knew that CSC had recently adopted new VSOE
7 policies before he began working for the firm, he was concerned that “most of the business units
8 were not aware that there was a new checklist” containing the proper VSOE procedures, and thus the
9 new procedures were not being consistently followed. *Id.* at ¶ 24.

10 The fourth accounting issue Nazif observed related to CSC’s practice of “capitalizing routine
11 research, development, and maintenance.” Nazif Decl. at ¶ 25. According to Nazif, “in order to
12 capitalize a software development cost” under GAAP, the company must be assured that the
13 development cost either “significantly increases the marketability of the product; or [] extends its
14 useful life.” *Id.* Nazif apparently “personally observed Ms. Hand approve issues for capitalization
15 based on bald assertions” that a software development “extended the useful life of the product.” *Id.*
16 Nazif also apparently “observed Ms. Hand approve capitalization before she received the supporting
17 documentation.” *Id.* Hand told Nazif we “should be rubberstamping these capitalization costs” but
18 when Nazif “refused to do so . . . she reassigned the work.” *Id.* at ¶ 26.

19 Finally, Nazif states that he was concerned that CSC did not have a “global contract
20 database” where employees could go to access all of CSC’s contracts, and particularly contracts that
21 were “related” to those contracts being considered for a particular accounting treatment. Nazif Decl.
22 at ¶ 28. Rather, “the accounting team needed to rely on the business units to self-report whether
23 there were related contracts.” *Id.* According to Nazif, this “is not a control that complies with
24 GAAP.” *Id.* Nazif alleges that “I expressed my concern that this was an inadequate control to . . .
25 Ms. Hand.” *Id.* Hand reports, however, that at no time during his employment did Nazif ever
26 “disclose[] to me that he believed any of CSC’s accounting policies, procedures, or practices
27 violated any state or federal laws, or could lead to misstatements on CSC’s required financial reports
28

1 and disclosures.” Docket No. 71-13 (Hand Decl.) at ¶ 31. Hand further declares that in her
2 experience, CSC’s accounting “comport[ed] with U.S. GAAP.” *Id.* at ¶ 32.

3 Sometime in November 2012, CSC reorganized its auditing group, and CSC’s Chief
4 Accounting Officer, Michael Sweeney, became Nazif’s direct supervisor. Docket No. 71-15
5 (Sweeney Decl.) at ¶¶ 5-6. On November 26, 2012, Sweeney phoned Nazif. *Id.* at ¶¶ 7-8.
6 According to Sweeney, he called Nazif to ask “what he was working on” and otherwise discuss
7 Nazif’s job responsibilities for CSC. *Id.* at ¶¶ 6, 8. Sweeney avers that Nazif “did not respond
8 directly to my inquiries, and I left the call unable to understand what Mr. Nazif was working on or
9 what he considered his duties to be.” *Id.* at ¶ 8.

10 Nazif remembers the November 26 call differently. According to Nazif, he expressed his
11 various concerns with CSC’s accounting practices to Sweeney. Specifically, Nazif states that he
12 “complained to Michael Sweeney about the Abbott Labs situation,” and that he variously “shared,”
13 “raised” and “expressed” his “concerns” regarding the other accounting practices described above.
14 *See* Nazif Decl. at ¶¶ 19, 23-24, 28. Nazif provided few additional details regarding *precisely* what
15 he told Sweeney, either in his declaration or during his deposition. *See, e.g.,* Nazif Depo. at 133:9-
16 141:21 (describing generally the four topics of conversation Nazif had with Sweeney but without
17 elaboration). Sweeney has testified that he “did not understand from Mr. Nazif” that what Nazif was
18 stating or suggesting on the November 26 call involved “any specific instances of, or systemic issues
19 of, improper accounting.” *See, e.g.,* Sweeney Decl. at ¶ 9.

20 On November 27, Nazif sent Sweeney an email that began: “Dear Mike: It was a pleasure
21 talking with you the other day [Nov. 26th] and I am looking forward to take [sic] all the
22 assignments/responsibilities as you see fit under your direction, which might be the same or different
23 than I had been assigned by Ms. April Hand . . .” Sweeney Decl, Ex. 19 (first bracketed alteration in
24 original). The email went on to list the accounting papers he had reviewed and his other outstanding
25 tasks. Nowhere in the email did Nazif mention any accounting “issues” or problems. *Id.* Indeed, it
26 is largely undisputed that there is *no documentary evidence* in the summary judgment record
27 whatsoever of Nazif making complaints or otherwise informing Sweeney or Hand that he believed
28

1 that CSC's accounting practices were fraudulent or materially violated any rule or procedure.² It is
2 similarly undisputed that Nazif did not tell any other CSC personnel about his belief that CSC was
3 violating securities laws, nor did he alert outside enforcement agencies while he was still employed
4 by CSC. *See* Nazif Depo. at 79:20-81:17 (admitting that he did not report any possible violations to
5 anyone other than Hand or Sweeney).

6 Toward the end of 2012, CSC "engaged in a major corporate-wide reorganization . . . meant
7 to cut costs and ensure the right people were in the right roles and the right locations." Sweeney
8 Decl. at ¶ 15. Sweeney was asked to "review the personnel in [his] group as a part of this exercise,
9 and understood [CSC's] charge to keep the better performers." *Id.* According to Sweeney, he spoke
10 with a number of individuals about Nazif's job performance. *Id.* at ¶ 16. Apparently, CSC staff had
11 "complained about Mr. Nazif" and stated that his "communication skills were poor . . . and that he
12 was not making a significant contribution." *Id.*; *see also* Hand Decl. at ¶ 18. Consequently,
13 Sweeney decided to fire Nazif. Sweeney Decl. at ¶ 17. Nazif disputes that he was a poor performer,
14 and contends that he was fired in retaliation for reporting potential securities law violations to
15 Sweeney and Hand. The only evidence Nazif presents to support a finding of retaliatory intent is the
16 timing between his alleged internal reports of illegality (made in the Fall of 2012) and his
17 termination (in January 2013).

18 **III. DISCUSSION**

19 CSC moves for summary judgment on all three of Plaintiff's wrongful termination claims.
20 For the reasons explained below, the Court grants the motion.

21 **A. Summary Judgment Standard**

22 The court may grant summary judgment "if the movant shows that there is no genuine
23 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R.

24
25 ² Nazif has pointed to some documents as evidencing proof that he complained about certain
26 practices to his superiors, but the Court finds that none of the documents bear this out. For instance,
27 when asked at his deposition about one such document that seemed to indicate Nazif's *agreement*
28 with Hand's proposed accounting treatment, Nazif testified that when he wrote to Hand telling her
that her accounting idea was "a good strategy," what he really meant to say was "that's improper."
See Nazif Depo. at 159:10-16. (Q: So what you really meant by "that's a good strategy" is "that's
improper"? A: Yes).

Civ. P. 56(a). The court must view the evidence, and draw all reasonable inferences therefrom, “in the light most favorable to the nonmoving party.” *Cameron v. Craig*, 713 F.3d 1012, 1018 (9th Cir. 2013). An issue of fact is material if it has the potential to “affect the outcome of the case.” *Kasperzyk v. Shetler Sec. Servs., Inc.*, No. C-13-3358 EMC/TEH, 2015 WL 1348503, at *6 (N.D. Cal. Mar. 25, 2015) (citations omitted).

When the moving party has carried its burden under Rule 56, “its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the party opposing summary judgment must “come forward with specific facts showing that there is a *genuine issue for trial* Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Id.* at 587 (internal quotation marks and citations omitted) (emphasis in original); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (holding that a party opposing summary judgment that has the burden of proof at trial must come forward with sufficient probative evidence as to each element of the claim(s) on which it bears the burden of proof); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 631 n.3 (9th Cir. 1987).

B. Nazif’s Dodd-Frank Act Claim Fails

Nazif’s first claim is for whistleblower retaliation in violation of Section 21F of the Dodd-Frank Act.³ *See* SAC at ¶ 35. As this Court recently explained in great detail in *Somers v. Digital Realty Trust*, Section 21F protects “whistleblowers” against retaliation where those individuals undertake one or more of the protected activities listed in the statute. *See Somers v. Digital Realty Trust*, -- F. Supp. 3d --, 2015 WL 2354807, at *3-4 (N.D. Cal. May 15, 2015). Here, Nazif concedes that he did not report any alleged law violations to the SEC during his employment with CSC, and so only subsection (iii) of Section 21F can apply to his claims. *See id.* As relevant here, that subsection protects certain employees from retaliation for “making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002.” *See id.* at *4; 15 U.S.C. § 78u-6(h)(1)(A)(iii).

³ Codified at 15 U.S.C. § 78u-6.

CSC argues that Nazif's DFA whistleblower claim fails for two main reasons. First, CSC argues that Nazif is not a "whistleblower" as a matter of law because he did not make an external report to the SEC. Alternatively, CSC argues that Nazif has provided insufficient evidence that he actually engaged in a protected activity (*i.e.*, blew the whistle). Specifically, CSC argues that Nazif presented insufficient proof that his subjective belief that CSC was engaging in securities law violations was objectively reasonable. While the Court recently rejected CSC's first argument,⁴ the Court finds that CSC's alternative contention has merit.

In order to prevail on his Dodd Frank claim, Nazif would need to present evidence that he made disclosures to Sweeney or Hand that were either "required or protected" under Sarbanes-Oxley (SOX). Nazif acknowledges that none of his claimed disclosures were "required" under any relevant law. Rather, he claims his disclosures were "protected" under 18 U.S.C. section 1514A, which is the SOX anti-retaliation provision. The parties agree that in order to prevail on his DFA claim, Nazif must prove that he *could* win a SOX anti-retaliation action brought directly under section 1514A. *See* Opp. Br. at 16. Stated differently, to show that his disclosure was "protected" under SOX, Nazif must show that he is entitled to the anti-retaliation protections of Sarbanes-Oxley.

1. Nazif Has Not Made A Prima Facie Case Under Sarbanes-Oxley

Section 1514A prohibits publicly-traded companies from "discriminat[ing] against an employee in the terms and conditions of employment" for "provid[ing] information . . . regarding any conduct which the employee reasonable believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(1). To make out a prima facie case for a violation of section 1514A, a plaintiff must establish that: (1) the employee engaged in a protected activity or conduct; (2) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) the

⁴ The Court rejects CSC's argument that Nazif cannot qualify as a whistleblower under the DFA because he did not make an external report to the SEC. In so doing, the Court adopts its reasoning in *Somers*. *See* 2015 WL 2354807.

1 circumstances were sufficient to raise the inference that the protected activity was a contributing
 2 factor in the unfavorable action. *See Van Asdale v. International Game Technology*, 577 F.3d 989,
 3 996 (9th Cir. 2009) (citing 29 C.F.R. § 1980.104(b)(1)(i)-(iv)). If the employee can satisfy these
 4 four elements, the burden shifts to the employer to demonstrate “by clear and convincing evidence
 5 that it would have taken the same adverse employment action in the absence of the plaintiff’s
 6 protected activity.” *Id.*

7 For the purposes of this motion, the Court assumes without deciding that Nazif has satisfied
 8 the final three elements of the prima facie test under SOX. The Court concludes, however, that
 9 Nazif has failed to present sufficient evidence to support his contention that he satisfies the first
 10 element of the SOX test; namely that he engaged in a protected activity or conduct. *See Van Asdale*,
 11 577 F.3d at 996.

12 As noted above, section 1514A only prohibits discrimination against an employee for
 13 providing information “regarding any conduct which the employee *reasonably believes* constitutes a
 14 violation of” a listed law. 18 U.S.C. § 1514A(a)(1) (emphasis added); *see also Van Asdale*, 577
 15 F.3d at 1000. Thus, as the Ninth Circuit has held, the “plain language of th[e] section, as well as the
 16 statute’s legislative history and case law interpreting it, suggest that to trigger the protections of the
 17 Act, an employee must . . . have (1) a subjective belief that the conduct being reported violated a
 18 listed law, and (2) this belief must be objectively reasonable.” *Van Asdale*, 577 F.3d at 1000
 19 (citations omitted).⁵

20
 21 ⁵ *Van Asdale* further holds that “to constitute protected activity under Sarbanes-Oxley, an
 22 ‘employee’s communications must ‘definitively and specifically’ relate to [one] of the listed
 23 categories of fraud or securities violations under 18 U.S.C. [] § 1514A(a)(1).” *Van Asdale*, 577
 24 F.3d at 996-97 (quoting *Platone v. FLYi, Inc.*, 25 IER Cases 278, 287 (U.S. Dept. of Labor Sept. 29,
 25 2006)). In 2011 the ARB abrogated *Platone* – the decision to which *Van Asdale* deferred –
 26 “concluding that the ‘definitively and specifically’ test is ‘inapposite’ to the Sarbanes-Oxley
 27 whistleblower protection provision and in ‘potential conflict with the express statutory authority of §
 28 1514A,’ which ‘prohibits a publicly traded company from discharging or in any other manner
 discriminating against an employee for providing information regarding conduct that the employee
 ‘reasonably believes’ constitutes a SOX violation.” *Nielsen v. AECOM Technology Corp.*, 762 F.3d
 214, 220 (2d Cir. 2014) (quoting *Sylvester v. Parexel Int’l LLC*, ARB No. 07-123, 2011 WL
 2165854, at *14-15 (ARB May 25, 2011) (en banc)). “The Board interpreted § 1514A to hew more
 closely to what its text expressly provides: that the plaintiff must have a subjective belief that the
 challenged conduct violates a provision listed in § 1514A, and that this belief must be objectively
 reasonable.” *Nielsen*, 762 F.3d at 221. The Second Circuit decided that the ARB’s latest
 interpretation of SOX was persuasive, and thus entitled to deference. The Third Circuit has

1 In order to ““have an objectively reasonable belief there has been shareholder fraud, the
2 complaining employee’s theory of such fraud must at least approximate the basic elements of a
3 claim of securities fraud.”” *Van Asdale*, 577 F.3d at 1001 (quoting *Day v. Staples, Inc.*, 555 F.3d 42,
4 55 (1st Cir. 2009)). For plaintiffs like Nazif, this means that there must be evidence the plaintiff had
5 an objectively reasonable belief that their employer’s violations involved a “material
6 misrepresentation or omission, scienter, a connection with the purchase or sale of a security,
7 reliance, economic loss, and loss causation.” *Id.* at 1001 (citing *Dura Pharms., Inc. v. Broudo*, 544
8 U.S. 336, 341-42 (2005)). This test does not require Nazif to “prove that [CSC] officials actually
9 engaged in fraud.” *Id.* But an objectively reasonable accountant in Nazif’s position would need to
10 believe that fraud occurred. *Id.*

11 Here, Nazif cannot satisfy the objective prong of the SOX test because he submitted
12 insufficient evidence to show that his “theory of fraud approximates a securities fraud claim.” *Van*
13 *Asdale*, 577 F.3d at 1001. Specifically, Nazif has cited no evidence that the GAAP violations he
14 complained of are “material” as that term is used in the context of a shareholder fraud cause of
15 action. As the First Circuit explained in *Day*, the “materiality requirement means that the
16 complainant must believe there is a ‘likelihood that the disclosure of the omitted fact would have
17 been viewed by the reasonable investor as having significantly altered the total mix of information
18 made available.’” *Day*, 555 F.3d at 57 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32
19 (1988)). Specifically in the context of GAAP violations, the Ninth Circuit has explained that such
20 violations are typically immaterial where they are “minor or technical in nature,” and are material
21 where they “constitute[] widespread and significant inflation of revenue.” *In re Daou Systems, Inc.*,
22 411 F.3d 1006, 1017 (9th Cir. 2005); *see also Nathanson v. Polycom, Inc.*, -- F. Supp. 3d --, 2015

24 similarly deferred to the ARB’s more recent interpretation of SOX. *See Wiest v. Lynch*, 710 F.3d
25 121, 131 (3d Cir. 2013) (“We conclude that the ARB’s rejection of *Platone*’s ‘definitive and
26 specific’ standard is entitled to *Chevron* deference.”). In the absence of Ninth Circuit authority
27 contrary to *Van Asdale*, the Court assumes that the “definitively and specifically” test still applies in
28 this Circuit. The Court believes that Nazif has not submitted sufficient evidence to meet the
“definitive and specific” standard articulated by the Ninth Circuit. Ultimately, however, whether or
not that portion of *Van Asdale* is still correct is irrelevant here, because Nazif cannot satisfy even the
lesser standard that requires that he held an objectively reasonable belief that CSC had violated the
securities laws.

1 WL 1517777, at *4 (N.D. Cal. Apr. 3, 2015) (holding that minor or technical GAAP violations are
2 quantitatively immaterial under Ninth Circuit law).

3 Despite the fact that he would have the burden to prove materiality at trial, Nazif made no
4 showing with respect to this element.⁶ In fact, what evidence Nazif has submitted undercuts any
5 potential inference of materiality. For instance, with regards to the Abbott Contracts, Nazif declared
6 that the overall contract value between the two contracts was more than \$1 million, but by splitting
7 the contracts up (*i.e.*, treating them as separate transactions, when they were truly related) Hand
8 avoided an “out of period adjustment” by making the contract value appear to be less than the \$1
9 million threshold for such a report. *See* Nazif Decl. at ¶ 18. Notably, Nazif did not present the
10 Court with evidence regarding the impact on CSC’s overall reported revenues that this inappropriate
11 accounting treatment might have had, if any. Nor did Nazif present any evidence regarding how
12 wide ranging this particular alleged accounting impropriety was, assuming that it was more than an
13 isolated incident. In any event, even if this Court assumes that the entire value of the Abbott
14 Contracts was improperly booked as revenue in a financial statement that was ultimately
15 disseminated to investors, a \$1-2 million overstatement of revenue would be a “minor or technical
16 violation” that is not material to a company, like CSC, that submitted uncontroverted evidence that it
17 reported annual revenue of over \$14 *billion* dollars during the period of Nazif’s employment.⁷ *See*
18 *In re Daou Systems*, 411 F.3d at 1018 (explaining that “although overstatement of revenues in

19
20 ⁶ The Court notes generally in this regard that Nazif’s briefing frequently makes factual
21 assertions without any record citations whatsoever. And often where Nazif does include record
22 citations, the cited documents often do not support (or directly support) the corresponding statement
23 in Nazif’s brief. It is worth repeating the familiar refrain that “judges are not like pigs, hunting for
truffles” *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)
(internal modification and citation omitted).

24 ⁷ Cases recognize that in some circumstances a misstatement could be “material” as a
25 qualitative matter, even if the misstatement is not quantitatively significant. *See Nathanson*, 2015
26 WL 1517777, at *4 (explaining that even if certain misstatements or omissions were “minor or
27 technical in nature . . . and thus quantitatively immaterial” the misstatement could nevertheless be
28 qualitatively material because “investors have a right to know – and would consider it important –
when the head of a publicly-owned company is stealing any quantity of money from their
company”) (citations and internal modification omitted). Nazif does not make this argument – he
makes no materiality argument at all – and there is no evidence or allegation that the misstatements
here are qualitatively significant, because, for instance, the CEO of CSC was stealing money from
the company.

1 violation of GAAP may support a plaintiff's claim of fraud," a plaintiff must show "how the
2 adjustments affected the company's financial statements and whether they were *material in light of*
3 *the company's overall financial position*" (emphasis added).

4 In fact, Nazif admitted in his summary judgment opposition that he "testified that he had
5 personal experience with approximately \$15 million of misstatements" by CSC before he was
6 terminated.⁸ Opp. Br. at 17. That is, Nazif testified at his deposition that he apparently believed that
7 the aggregate effect of the various accounting flaws he identified on CSC's overall revenues would
8 have been approximately \$15 million. *See id.* By any measure, no objectively reasonable
9 accountant could have believed that a revenue misstatement of "approximately \$15 million" was
10 sufficiently material to corporation as large as CSC to warrant a colorable suspicion of securities
11 fraud. Moreover, the Court observes that Nazif: (1) presented no evidence that any of the alleged
12 GAAP violations he reported were widespread accounting problems at CSC as opposed to isolated
13 incidents; (2) admits that he had no knowledge at the time he was terminated whether any of the
14 alleged accounting issues were widespread; and (3) conceded at his deposition that at least some of
15 the GAAP "violations" that he identified to Sweeney and Hand are not clear-cut violations of GAAP
16 – rather they would only be considered "violations" by someone who agreed with Nazif's
17 interpretation of what GAAP requires. *See* Nazif Depo. at 255:19-256:1 (agreeing that "whether an
18 enhancement is properly capitalized" is a "matter of interpretation that requires some amount of
19 judgment and accounting expertise"); *see also* LeGraverend 30(b)(6) Depo. at 64:15-65:1 (CSC's
20 accounting expert testified that while Nazif's interpretation of GAAP vis-a-vis software
21 capitalization was not "unreasonable," there is room for debate because there are "few details in
22 [GAAP's] guidance on that specific topic"). Put simply, no reasonable juror could find that an

23
24
25 ⁸ Plaintiff speculates that the amount of any misstatement "might be much larger given his
26 limited exposure" to CSC's accounting practices, but this surmise is irrelevant. The question before
27 the Court is whether Nazif engaged in protected activity at the time he told Hand and Sweeney about
28 CSC's alleged GAAP problems. Nazif does not claim (and has submitted no evidence that would
indicate) that he told Hand and Sweeney that there could be *additional* misstatement problems
lurking in the ether. Nazif's claim is simply that he was terminated for reporting known GAAP
violations which allegedly totaled \$15 million.

1 objectively reasonable accountant in Nazif's position would have suspected CSC was guilty of
2 securities fraud.

3 By way of comparison, the Court recounts the evidence that the Ninth Circuit found
4 sufficient to survive summary judgment on the plaintiffs' SOX claim in *Van Asdale*. *See Van*
5 *Asdale*, 577 F. 3d at 1001 (holding that plaintiffs' claims survived summary judgment because they
6 had submitted evidence to support a "theory of fraud [that] approximates a securities fraud claim").
7 The *Van Asdale* plaintiffs were intellectual property attorneys at defendant International Game
8 Technologies (IGT). *Id.* at 991. At some point IGT merged with another gaming company, Anchor
9 Gaming. *Id.* at 993. One of the main assets that Anchor brought to the merger was a patent that
10 covered most of IGT's slot machines; machines which "generate[d] a substantial portion of IGT's
11 total income." *Id.* at 1001. One IGT employee described the patent as "the Crown Jewel of IGT's
12 intellectual property portfolio." *Id.*

13 Sometime after the merger, plaintiffs claimed they discovered that Anchor had known all
14 along (*i.e.*, pre-merger) that the relevant patent was invalid. *Id.* at 993. While plaintiffs never used
15 the words "fraud," stock fraud, or similar, they told certain IGT executives that Anchor was "aware"
16 of the invalidating prior art, "had not disclosed it prior to the merger, and that 'there's a possibility it
17 could go to the top.'" *Id.* at 993. Shortly after plaintiffs revealed this information to their superiors,
18 they were fired. *Id.*

19 The Ninth Circuit held that the above allegations were sufficient to present a triable issue of
20 fact for the jury. Specifically, the panel found that it was "clear" that the withheld prior art was
21 material because it arguably invalidated the "Crown Jewel" of the acquiring company's patent
22 portfolio, and plaintiffs had further informed management that "the merger would not have occurred
23 if IGT had been made aware of the [prior art]." *Id.* at 1001. Moreover, "[g]iven the potential
24 importance of the [prior art] and related documents, the top management positions at IGT occupied
25 by several former Anchor officials, and their alleged financial motives favoring nondisclosure, we
26 hold that it was objectively reasonable for [plaintiffs] to suspect that the non-disclosure of the [prior
27 art] prior to the merger could have been deliberate." *Id.*

1 Nazif has cited insufficient evidence to support any claim of materiality, and unlike in *Van*
2 *Asdale*, a reasonable inference of materiality is not obvious when viewing the facts in the light most
3 favorable to Nazif. At best, a jury could conclude that Nazif reported “minor or technical” GAAP
4 violations to his superiors. *See In re Daou Systems*, 411 F.3d at 1017. This is insufficient to state a
5 valid *prima facie* claim under Sarbanes-Oxley.

6 Plaintiff’s alternative argument fares no better. In addition to arguing that CSC violated the
7 securities laws by misstating certain accounting figures in violation of GAAP, Nazif claims he
8 informed Hand and Sweeney that CSC’s failure to maintain a “global contract database” was an
9 “inadequate internal control” under GAAP. Nazif Decl. at ¶ 28. Specifically, he claims that CSC’s
10 failure to maintain a global contract database violated the “books and records” provision of the
11 Exchange Act, although he admits he did not say as much to either Sweeney or Hand. *See* 15 U.S.C.
12 § 78m(b)(2) (requiring public companies to “devise and maintain a system of internal accounting
13 controls sufficient to provide reasonable assurances that . . . transactions are recorded as necessary to
14 . . . permit preparation of financial statements in conformity with [GAAP] . . . and [] to maintain
15 accountability for assets”).

16 Section 78m (the “books and records” provision) does not require or protect any disclosures
17 in its own right. Thus, the only way Nazif’s complaint about inadequate record keeping could be
18 “protected” under SOX (as it must be to state a claim under Dodd Frank) is if the books and records
19 provision is construed as one “relating to fraud against shareholders.” *See* 18 U.S.C. § 1514A
20 (prohibiting retaliation against an employee who provides information “regarding any conduct
21 which the employee reasonably believes constitutes a violation of . . . any provision of Federal law
22 relating to fraud against shareholders”). But even assuming that Nazif’s report of books and records
23 violations *could* be protected under SOX, Nazif’s books and records claim nevertheless fails for the
24 same reason his other DFA claims fail; Nazif has not made any showing that an objectively
25 reasonable individual in his position would have believed that CSC’s failure to maintain a “global
26 contracts database” was potential evidence of “fraud against shareholders.” Stated differently, Nazif
27 presented no evidence that would indicate that CSC’s apparent failure to maintain a “global
28 contracts database” could (and actually did) result in the publication or dissemination of materially

misleading or inaccurate financial statements. Rather, Nazif simply speculates that such misstatements possibly could have occurred.

As both the ARB and Second Circuit have recognized, “[i]t may well be that a complainant’s complaint concerns such a trivial matter’, in terms of its relationship to shareholder interests, ‘that he or she did not engage in protected activity under § 1514A.’” *Nielsen*, 762 F.3d at 222 (quoting *Sylvester*, 2011 WL 2165854, at *19) (internal modification omitted). This is such a case. CSC is entitled to summary judgment on Nazif’s Dodd Frank whistleblower retaliation claim.

C. Nazif’s California Labor Code Claim Fails

Nazif’s operative complaint contains claims for retaliatory termination brought under both California Labor Code sections 1102.5(b) and (c). SAC at ¶¶ 28-33. Nazif did not oppose CSC’s summary judgment motion regarding his section 1102.5(b) claim – Nazif admits he did not report alleged wrongdoing to any “government or law enforcement agency” before he was fired, and such an external report is a necessary predicate for a section 1102.5(b) claim. *See* Cal. Lab. Code 1102.5(b) (prohibiting an employer from retaliating against an “employee for disclosing information . . . to a government or law enforcement agency”); *see also Weingand v. Harland Financial Solutions, Inc.*, No. 11-cv-3109 EMC, 2012 WL 3537035, at *4 (N.D. Cal. Aug. 14, 2012) (noting that Labor Code section 1102.5(b) “does not apply to plaintiff because he only reported his concerns to a private employer, rather than a public agency”).

Nazif *does* oppose CSC’s summary judgment motion with respect to his section 1102.5(c) claim, however. “To establish a prima facie case under section 1102.5, Plaintiffs must offer proof that (1) they engaged in a protected activity, (2) Defendant subjected them to adverse employment actions and (3) there is a causal link between the two.” *Casissa v. First Republic Bank*, No. 09-cv-4129, 2012 WL 3020193, at *9 (N.D. Cal. July 24, 2012) (citing *Mokler v. Cnty. of Orange*, 157 Cal. App. 4th 121, 138 (2007)). There is no dispute Nazif satisfies the second prong, and the Court assumes without deciding that he could satisfy the third prong as well. Nevertheless, Nazif’s

1 retaliatory termination claim fails because he has not produced any evidence to suggest that he
2 “engaged in a protected activity” as that term is used in section 1102.5.⁹

3 Section 1102.5(c) “forbids an employer from taking retaliatory action against an employee
4 for ‘refusing to participate in an activity that would result in a violation of state or federal law, or a
5 violation or noncompliance with a state or federal rule or regulation.’” *Casissa*, 2012 WL 3020193,
6 at *8 (quoting Cal. Lab. Code § 1102.5(c)). As Judge Wilken has explained, the Legislature enacted
7 the statute “to protect employees who refuse to act at the direction of their employer or refuse to
8 participate in activities of an employer that would result in a violation of law.” *Id.* (internal
9 quotation marks and citation omitted).

10 Here, Nazif has presented no evidence that he refused “to participate in an activity that
11 would result in a violation of state or federal law, or a violation or noncompliance with a state or
12 federal rule or regulation.” Cal. Lab. Code § 1102.5(c). Indeed, the only activity Nazif claims that
13 he refused to participate in was Hand’s instruction to “rubberstamp” certain software development
14 capitalization costs.¹⁰ *See* Opp. Br. at 20. *See* Nazif Decl. at ¶¶ 25-26 (stating that Hand “wanted
15 me to coach the business unit into including information that would qualify the cost to be
16 capitalized, regardless of whether it should be. She told me that we should be rubberstamping these
17 capitalization costs. I refused to do so, and she reassigned the work”). But even assuming, as this
18 Court must, that Nazif refused to “rubberstamp” these capitalization costs, that is not sufficient to
19 state a claim under section 1102.5(c) because Nazif has not established that “rubberstamping”
20 capitalization costs “would result in a violation of state or federal law.” *See* Cal. Lab. Code §
21 1102.5(c).

23 ⁹ Defendant argues in the alternative that this claim fails because Nazif did not exhaust his
24 administrative remedies. This Court rejected a similar argument in *Melgar v. CSK Auto, Inc.*, No.
25 13-cv-3769 EMC, 2014 WL 546915 (N.D. Cal. Feb. 7, 2014). The Court will not revisit that
decision here, because it finds that CSC is entitled to summary judgment on Nazif’s retaliatory
termination claim in any event.

26 ¹⁰ One could potentially read Nazif’s complaint to allege that he refused to participate in any
27 of the allegedly improper accounting practices he claims he identified to Hand and Sweeney. But
28 even construing Nazif’s complaint in this way, Nazif has no viable claim under section 1102.5(c)
because he identifies no federal or state law that was violated by any of the accounting practices he
refused to endorse. Instead, Nazif alleges simply that such accounting practices violate GAAP.

Indeed, Nazif testified at his expert deposition that he was not aware of any state or federal law that speaks to, or regulates, the proper accounting treatment for the capitalization of software development costs. Nazif Expert Depo. at 314:9-317:10.¹¹ Instead, Nazif testified that Hand's behavior vis-a-vis software capitalization costs was in violation of GAAP. *See* Nazif Expert Depo. at 316:21-24 (Q: To your knowledge, does the situation that you just described [regarding software capitalization] constitute noncompliance with state or federal rules of regulations? A: As I mentioned, based on against [sic] the GAAP.). As a number of courts have recognized, however, violations of GAAP are not necessarily violations of law. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1020-21 (5th Cir. 1996). As the Fifth Circuit explained, "[t]he term 'generally accepted accounting principles,' as we have often noted, is a term of art encompassing a wide range of acceptable procedures, such that 'an ethical, reasonably diligent accountant may choose to apply any of a variety of acceptable accounting procedures when that accountant prepares a financial statement.'" *Id.* at 1021 (citing *Fine v. American Solar King Corp.*, 919 F.2d 290, 297 (5th Cir. 1990)). Thus, as the Ninth Circuit has recognized, the "'mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish'" a violation of the securities (or any other) laws. *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 390 (9th Cir. 2002) (quoting *In re Software Toolworks Inc.*, 50 F.3d 615, 627 (9th Cir. 1994)); *see also Lovelace*, 78 F.3d at 1020; *In re Daou Systems*, 411 F.3d at 1017 (holding that "minor or technical" violations of GAAP typically cannot typically undergird a securities fraud claim).

Indeed, Nazif's section 1102.5(c) claim is particularly defective because Nazif has made no effort to establish that any of the GAAP violations that he refused to condone ever resulted in incorrect figures being *published* in a CSC financial statement or otherwise disseminated to investors or other company outsiders. Nor has Nazif attempted to prove the number of GAAP violations that occurred, or that any potential GAAP violation that was reported to investors was material. *See* Section 3.B, *supra*. Thus, even though Nazif argues that one can infer that he refused

¹¹ The Court also notes that Nazif further testified that the proper accounting of software development costs is open to at least some interpretation under GAAP. Nazif Depo. at 255:19-256:1 (agreeing that "whether an enhancement is properly capitalized" is a "matter of interpretation that requires some amount of judgment and accounting expertise").

1 to violate certain (unidentified) federal or state laws that prohibit making false entries in certified
2 accounting statements, there is no evidence in the record before this Court that the specific conduct
3 Nazif refused to participate in ever resulted in the publication of inaccurate accounting statements or
4 the violation of any specific law. Without such evidence, Nazif cannot make out a *prima facie* case
5 for retaliatory termination under California law.

6 In fact, Magistrate Judge James recently rejected a claim brought under Labor Code section
7 1102.5(c) where the plaintiff, like Nazif, argued that they had refused to participate in the “falsifying
8 of financial and/or accounting statements” where they refused to go along with alleged GAAP
9 violations. *Dauth v. Convenience Retailers, LLC*, No. 13-cv-47 MEJ, 2013 WL 5340396, at *2
10 (N.D. Cal. Sept. 24, 2013). As Judge James recognized, a plaintiff “must specify the law, rule, or
11 regulation that supports her claim” in order to “establish a *prima facie* case for violation of section
12 1102.5(c).” *Id.* The court concluded that “Plaintiff’s reliance on GAAP is . . . insufficient.” *Id.*
13 This was so because “[w]hile GAAP may provide mandatory accounting reporting requirements,
14 Plaintiff has not cited any authority indicating that GAAP regulations equate to state or federal
15 statutory or regulatory law. Notably, as Defendants point out and as Plaintiff acknowledges, GAAP
16 procedures are issued by the FASB – an independent private sector organization – not a state or
17 federal entity. In fact, as Defendants correctly argue, courts have recognized that GAAP does not
18 establish mandatory procedures, but a ‘wide range of acceptable procedures’ that an accountant may
19 choose to apply when the accountant prepares a financial statement.” *Id.* (quoting *Reiger v. Alrtis*
20 *Software, Inc.*, 1999 WL 540893, at *6 (S.D. Cal. Apr. 30, 1999)).

21 In his opposition brief, Nazif writes that he “observed numerous violations of GAAP which
22 he believed (and are) [sic] violations of federal and state securities laws and regulations, including
23 without limitation, the DFA, Sarbanes-Oxley, Rule 10b-5, and the books and records provisions of
24 the ‘34 Act.” Opp. Br. at 24. Notably, this sentence is not followed by any citation, and the Court
25 has identified no provision of either federal or state law that *prohibits* the mere act of capitalizing
26 software development costs in a manner inconsistent with GAAP, or otherwise failing to comply
27 with GAAP in all circumstances regardless of materiality. Nor does Nazif cite any case where a
28 plaintiff who refused to endorse a GAAP violation, without more, was held to state a claim under

1 section 1102.5(c). Like the plaintiff in *Dauth*, Nazif has not cited any “authority indicating that a
2 failure to follow a GAAP procedure, standing alone, constitutes a violation of federal or state law.”
3 *Dauth*, 2013 WL 5340396, at *2. Thus, CSC is entitled to summary judgment on this claim.

4 D. Nazif’s Wrongful Termination in Violation of Public Policy Claim Fails

5 Nazif’s final claim alleges that he was wrongfully terminated in violation of public policy.
6 “A claim for wrongful termination in violation of public policy must be based on a fundamental
7 policy established by a constitutional, statutory or regulatory provision.” *Casissa*, 2012 WL
8 3020193, at *11 (citing *Green v. Ralee Eng’g Co.*, 19 Cal. 4th 66, 76 (1998)).

9 Here, the statutory provisions that Nazif alleges CSC violated when it terminated him are
10 Dodd Frank’s whistleblower-protection provision and Labor Code section 1102.5. As discussed
11 above, Nazif has not presented sufficient evidence to proceed to the jury on either of these claims.
12 There is no genuine issue of disputed fact as to whether Nazif engaged in “protected activity” under
13 either statute. Thus, his wrongful termination in violation of public policy claim must similarly fail.
14 See *Casissa*, 2012 WL 3020193, at *11 (“To the extent that Plaintiffs’ *Tameny*¹² causes of action rest
15 on the fundamental policy established by section 1102.5(c), these claims fail for the same reason that
16 Plaintiffs have failed to establish a prima facie case for violations of this section.”).

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27
28 ¹² Wrongful termination in violation of public policy claims are often “referred to as *Tameny*
claims, after the decision in *Tameny v. Atlantic Richfield Co.* . . .” *Id.*


IV. CONCLUSION

Viewing the evidence in the light most favorable to Nazif, it is plain that he reported only minor or technical violations of GAAP to CSC. CSC is therefore entitled to summary judgment because Nazif has not presented evidence from which a reasonable jury could find that he engaged in protected activity under either the DFA or the Labor Code.

This order disposes of Docket Nos. 66, 67, and 71.

IT IS SO ORDERED.

Dated: June 17, 2015



EDWARD M. CHEN
United States District Judge